

REMARKS

Claims 1-24 are pending in the application. Claims 1 and 13 are independent.

Claims 1 and 13 are objected to and have been amended as suggested by the Examiner in order to place the case in better condition for appeal.

Claims 1, 2, 12-14, and 24 are provisionally rejected under the doctrine of obviousness-type double patenting over claims 1, 6, 8, and 9 of co-pending application serial number 09/717,999. It is respectfully submitted that all of the claims of the instant application are clearly patentably distinct over claims 1, 6, and 8 of serial number 09/717,999, and that claim 9 of the '999 application includes considerable elements in addition to all of the elements of claim 1 of the instant application, and therefore claim 1 of the instant application and claim 9 of the '999 application are patentably distinct. However, in order to expedite allowance of this case after appeal, a terminal disclaimer together with the \$55 small entity fee is enclosed herewith and overcomes this rejection.

## REQUEST FOR RECONSIDERATION

Claims 1, 2, 12-14, and 24 stand rejected under 35 U.S.C. §103 as obvious over Gorshe. Regarding claims 1 and 13, the Examiner admits that Gorshe does not teach or suggest that requests made during row N are for space in row N+1. It is the Examiner's opinion that making requests during row N are for space in row N+1 is obvious because "space could be provided in any row subsequent to row N and no unexpected result is produced by providing space in row N+1."

The Examiner's reasoning is flawed on two counts. First, it is the Applicant's position that absent the present invention, it is not possible to provide space in row N+1 following a request in row N and that is why it is not shown or suggested in the prior art. Thus, contrary to the Examiner's assertion space could not be provided in any row subsequent to row N.

Second, unexpected results are an indication of non-obviousness, but the lack of unexpected results is not an indication of obviousness. See, e.g., MPEP §716.01(a). "Note that the lack of objective evidence of non-obviousness does not weigh in favor of obviousness. Miles Labs. Inc. v. Shandon Inc., 997 F.2d 870, 27 USPQ2d 1123, 1129 (Fed. Cir. 1993), cert. denied, 127 L. Ed. 232 (1994). However, where a *prima facie* case of obviousness is established, the failure to provide rebuttal

evidence is dispositive." Id. Here, the Examiner has not made a *prima facie* case of obviousness.

MPEP §706.02(j) defines what is required of the Examiner to make a *prima facie* case of obviousness (i.e. what is required to make a §103 rejection). The Examiner has not met his burden of making a proper rejection. The cited art does not teach or suggest the invention and no evidence has been offered by the Examiner to supplement the shortcomings of the prior art. The Examiner's rejection is based on the unsupported statements that the claimed invention could have been done before and that no unexpected result is produced by the invention. This may be the Examiner's opinion, but that is not enough to make a §103 rejection. Pursuant to MPEP §2144.03, the Applicant may require the Examiner to show evidence of what he assumes to be common knowledge. As of this date, the Examiner has not shown any evidence to support his statement that "space could be provided in any row subsequent to row N and no unexpected result is produced by providing space in row N+1." Absent evidence which supports this statement, the Examiner's rejection is clearly improper.

The remainder of the Final Rejection is moot as all of the rejections depend on the unsupported allegation that "space could be provided in any row subsequent to row N and no unexpected result is produced by providing space in row N+1." However, it is

noted that many of the dependent claims are also allowable over the cited art either because the cited art does not show what the Examiner contends it shows or because the combination made by the Examiner lacks proper incentive.

In light of all of the above, it is submitted that the claims are in order for allowance, and prompt allowance is earnestly requested. If the Examiner disagrees, it is requested that the amendment be entered in order to place the case in better condition for appeal.

Respectfully submitted,



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Encl.: Terminal Disclaimer  
\$55 fee for disclaimer